Petition

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IN THE SUPREME COURT OF THE UNITED STATES

GEORGE VICHOS,
Petitioner

-VS-

UNITED STATES OF AMERICA
Respondent

COURT OF APPEALS
NO. 80-5013

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT DEPRIVED DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY BY (A) REQUIRING A SYSTEM OF PEREMPTORY CHALLENGES WHICH DEPRIVED DEFENDANT OF THE EFFECTIVE EXERCISE OF THOSE CHALLENGES, AND BY (B) FAILING TO GRANT DEFENDANT'S CHALLENGE FOR CAUSE TO A PROSPECTIVE JUROR?

II. WAS IT REVERSIBLE ERROR AS A VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION TO PERMIT THE TRIAL COURT TO PROCEED AFTER A FORMER CODEFENDANT STATED BEFORE THE JURY THAT THE DEFENDANT HAD DISCUSSED ENTERING A PLEA OF GUILTY?

III. WHETHER IT IS REVERSIBLE ERROR FOR THE PROSECUTION TO PLACE BEFORE THE JURY THAT THE DEFENDANT, A MARRIED MAN, HAD HAD AN ILLICIT AFFAIR WITH A SINGLE WOMAN WHEN THAT TESTIMONY IS OFFERED FOR NO PURPOSE OTHER THAN UNFAIRLY PREJUDICING THE JURY TOWARDS THE DEFENDANT?

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IN THE SUPREME COURT OF THE UNITED STATES

GEORGE VICHOS,
Petitioner

-VS-

COURT OF APPEALS
NO. 80-5013

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

George Vichos, petitioner, by his attorneys, O'CONNELL & WAYNE, respectfully pray that this Court issue a Writ of Certiorari to review the Order of Judgment of the United States Court of Appeals for the Sixth Circuit entered June 11, 1981 in Docket No. 80 5013, Re-Hearing Denied July 22, 1981.

JURISDICTION OF THE COURT

The Order of judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed herein is dated June 11, 1981 and was entered on June 11, 1981. The Motion for Re-Hearing was denied on July 22, 1981.

Jurisdiction is conferred by 28 USC Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

18 USC 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or

for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645. 62 Stat. 701."

18 USC 1005:

"Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As used in this section, the term "national bank: is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank or bank and trust company, which has be-

come a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. June 25, 1948, c. 645, 62 Stat. 750."

6th Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rules of Criminal Procedure, Rule 24 (b):

"If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges.

If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly."

STATEMENT OF THE CASE

The Defendant, George Vichos, and Co-Defendant, Harold Van Wyck, were charged in a six count indictment, which was subsequently dismissed when Co-Defendant, Van Wyck, entered into a Rule 11 plea agreement. The

follow up indictment attached hereto was then obtained against the Defendant, Vichos. Defendant was charged with "---knowingly, wilfully, and unlawfully combined, conspire, and agree, with Harold Van Wyck and Donna Sullivan and others not named herein, to commit an offense against the United States; to wit' to cause the making, drawing, issuance, and putting forth of obligations of a bank, whose deposits are insured by the Federal Deposit Insurance Corporation, by an employee thereof without the authority of the directors of said bank;---".

In two additional counts he was charged with "---knowingly and wilfully aid, abet, counsel, and procure an employee of the Community National Bank of Pontiac, a bank whose deposits are insured by the Federal Deposit Insurance Corporation, to make, draw, issue, and put forth, without authority from the directors of such bank, obligations of said bank; to wit: Cashier's Check---". This charge included the issuance of five cashier's checks which approximated $50,000.00 in value.

The testimony at trial shows that in early March of 1978, Defendant, Vichos, was present with Donna Sullivan (later Donna Sullivan Allen), Laura Sims and Harold Van Wyck, that a conversation was had wherein Vichos questioned Donna Sullivan about the length of time it would take a check to reach the bank where she worked, if the check were drawn on that bank and deposited in another bank. He expressed an interest in opening an account at the bank where she worked and was trying to determine how much time he would have to cover a check that was written without sufficient funds on deposit. He wanted to float a check or checks for a period of thirty to forty-five days with the idea in mind of the check being good at the end of that period. Donna Sullivan and Laura Sims originated the idea of a cashier's check scheme, whereby Donna Sullivan, who was a relatively short term but trusted employee of the Community National Bank, would write cashier's checks made payable to George Vichos. She would give them to

her boyfriend, Harold Van Wyck, who would in turn give them to Vichos, who in turn took them to banks and cashed them. The testimony showed that Harold Van Wyck and Donna Sullivan were having a relationship and that Harold Van Wyck brought himself a Trans Am automobile after the checks were issued, and that he planned to by a Cadillac automobile and have it customized so that it would be a convertible, which would have cost in the area of $20,000.00. The testimony also showed that Van Wyck promised Donna Sullivan a new Trans Am and an apartment. It was further testified that while the cashier's checks were made out to George Vichos, each of them were given by Sullivan to Van Wyck who turned them over to Vichos. Additionally, during the Van Wyck's testimony, facts were illicited which showed several large expenditures of money, which when added to other plans he had expressed to Donna Sullivan, would account for practically all of the money received from the cashier's checks. Although it was the contention of Van Wyck that he had given money to Vichos, and it was part of the Rule 11 agreement that he would take a lie detector test to determine the amount of his restitution. After his testimony was given it was determined not to give him the lie detector test. The Defendant, of course, claims that this was because Van Wyck received all but approximately $300.00 of the money.

During jury selection the Court imposed a requirement that peremptory challenges had to be expressed by round so that each side had to make two or three peremptory challenges each time they were given the opportunity. If they did not take those peremptory challenges they would lose them. On the Defendant's last round he had to either take three peremptory challenges or lose all three. The juror that was selected in response to the Defendant's first peremptory challenge in the last round was a lady named, McKee, a long time bank employee. Defense counsel attempted to challenge her for cause because of her relationship with a bank, which challenge was denied. Under the "round" system of choosing the jury, the Court dictated

the number of challenge that had to be exercised in each round. The Court further dictated in which rounds alternate jurors could be challenged. Any challenges not used during the round assigned would be forfeited. Under this Court imposed method, which Defendant objected to from the beginning, Defendant exercised his allotted peremptory challenges in the last round. The first one of the jurors seated was Mrs. McKee, a bank teller with 20 years experience. Defendant would have had to sacrifice his last three peremptory challenges in order to avoid Mrs. McKee. He, of course, did not know that she would have been the first of the three, or any of the three chosen.

Near the beginning of the cross-examination of defense witness, Laura Sims, (Volume 4, P. 58), the witness, Sims, was asked by the United States Attorney for no apparent reason other than to prejudice the jury, whether or not she had "---any romantic involvement with Mr. Vichos", and was asked specifically, "Well, did you have an affair with him?" She answered, "Yes."

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS WAS CLEARLY IN ERROR IN HOLDING THAT DEFENDANT WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY BY (A) REQUIRING A SYSTEM OF PEREMPTORY CHALLENGES WHICH DEPRIVED DEFENDANT OF THE EFFECTIVE EXERCISE OF THOSE CHALLENGES AND BY (B) FAILING TO GRANT DEFENDANT'S CHALLENGE FOR CAUSE TO A PROSPECTIVE JUROR.

During the course of jury selection the trial court required that the prosecution and defense exercise their peremptory challenges by rounds. If all of the peremptory challenges that were alloted to that round were not used during the round, any challenges that were not used were lost, that is, if a side should pass up his opportunity to

excuse a juror and excused any number less than the number alloted to him in that round, that side nonetheless used up one of its' peremptory challenges. On the last round, defense counsel either had to use three peremptory challenges or lose them. At the beginning of that round, the first juror chosen was a bank teller with 20 years experience. If he had not exercised that peremptory challenge he would have lost three peremptory challenges. Since the Defendant was charged with procuring fraudulent issuance of a cashier's check, the tellers' knowledge of banks and banking resulted in defense counsel's seeking to challenge that juror for cause. However, even with the apparent bias of the prospective juror the Judge refused Defendant's challenge for cause. In the normal course of jury selection, defendant would have had two challenges for causes left after having had an opportunity to question that juror. The round method selected by this particular judge requires a Defendant to run the risk of getting an adverse juror if he exercises any challenges whatsoever in the last round. It does away with the very practical defense tactic of not using your last challenge unless you feel it absolutely necessary.

A. A system which required defendant to forfeit peremptory challenges if not exercised during the "round" to which the challenge is assigned, is contrary to FRCP 24(b) and deprives Defendant of his Sixth Amendment right to a fair and impartial jury, and is a denial of due process.

Federal Rules of Criminal Procedure, Rule 24 states:

> (a) EXAMINATION. The court may permit the defendant to his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the

examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) PEREMPTORY CHALLENGES. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

It is notable that the language of subsection a) contains both discretionary and mandatory language. It indicates the intent of the drafters to provide options in some instances and to eliminate options in other instances. Such action by the drafters is relevant to a proper interpretation of the language of subsection b) which appears, on a first reading, to contain neither discretionary nor mandatory language in establishing the number of peremptory challenges. However, the lack of discretionary words such as "may", the use of language such as "is entitled" must be interpreted to impose a mandatory obligation on the court. Consequently, in a capital case the court could not, in the exercise of discretion, limit the number of peremptory challenges to fewer than twenty. Likewise, in the instant case, the court could not limit defendant's peremptory challenges to fewer than that authorized by the court rule.

It is not sufficient that the court purport to give Defendant the requisite number of peremptory challenges when it in fact gives him fewer. While the court has broad

discretion in fashioning the method by which peremptory challenges are to be exercised, *United States* v. *Morris*, (10 Cir. 1980) 623 F. 2d 145, the trial judge's discretion is not unlimited. *United States* v. *Anderson*, (6 Cir. 1977) 562 F2d 394. In *St. Clair* v. *United States*, 154 U.S. 134, 148, 14 S.Ct. 1002, 1008, 38 L.Ed. 936 (1894), Justice Harlan stated that

> (A)ny system for the impaneling of a jury that prevents or embarrasses the full, unrestricted excercise by the accused of his right of peremptory challenge, must be condemned . . .

Once it is determined that the court must provide the required number of challenges, it follows naturally, and sensibly, that there must exist a concommitant right to meaningfully exercise those peremptory challenges. *United States* v. *Rucker*, (4 Cir. 1977) 557 F2d 1046.

Numerous cases detail various methods for exercising peremptory challenges. In *United States* v. *Morris*, *supra*, a "struck" jury system was used in which twenty-two jurors were seated, sixteen were struck through the exercise of six peremptories by the prosecution and ten by the defense. This left a panel of six jurors to hear the case. But the defendant in *Morris* was afforded a full opportunity to examine the prospective jurors and to exercise *all* of his peremptory challenges. And further, the defendant in *Morris* was not subjected to the risk of forfeiture and then the drawing of an obviously unfavorable juror. The system in Morris was eminently fair as noted by the court in quoting from *United States* v. *Sams*, 470 F2d 751 (5th Cir. 1972), at 754.

> It is difficult to conceive a fairer method of giving the defendant an opportunity to make a full choice of the range of the venire of 32 persons (12 to serve, 10 subject to challenge by the defense, 6 subject to challenge by the prosecution, and 2 to be chosen by alternative strikes of the remaining 4 to serve as

> alternates) than was used in the *Williams* case. It embodied the system whereby all 32 veniremen were initially qualified and were subjected to the voir dire by the court and counsel. Thus, before counsel made their first strike or peremptory challenge they had the full range of possibilities of all jurors who might conceivably sit on the case available to them for comparison.

In the instant case the defendant did not have the full range of possibilities before him when he began to exercise his peremptory challenges. Clearly, if he had, the bank teller never would have made it past the first round of challenges. In this case Defendant was forced to gamble. This is neither the design nor purpose of challenging jurors.

The system established for exercising the peremptory challenges in *United States* v. *Haldeman*, 559 F2d 31 (D.C. Cir. 1976), required the prosecution and defense to alternate the exercise of challenges. Two failures to exercise a challenge would bring about a forfeiture of that challenge. While this system holds superficial similarity to the system employed in the instant case, it differs fundamentally. In *Haldeman*, venireman were place in the jury box according to a pre-determined order. Thus, counsel could anticipate the use and distribution of peremptory challenges since it was known in advance who would be coming to the jury box after each challenge was exercised. And in any event, Defendants still had two individual challenges and the government had one at the stage where defendants elected to forfeit. The rationale for this action, according to the court was to force the government to exercise its challenge, thereby reaching down the predetermined list to a venireman allegedly favorable to the prosecution. *Haldeman, supra* at 80.

In this case, not only was Defendant compelled to forfeit his peremptory challenge, but he also had to suffer the random selection of the last and perhaps fatal juror, the bank teller. Further, in *Haldeman, supra* Defendants were

permitted additional peremptory challenges at the beginning of the selection process. The forfeiture, then, can be viewed in *Haldeman* as the loss of peremptories that were within the realm of the court's discretion to grant. Nothing, therefore, was lost to the Defendants in *Haldeman* in terms of peremptory challenges which are now secured by FRCP 24. While FRCP 24 was not in effect at the time of the *Haldeman* trial the trial court nonetheless considered the proposed rule as its guide in determining the number of challenges to be allowed the Defendants. In seeking guidance from the Advisory Committee notes on the amendment to FRCP 24 at the time of trial, the *Haldeman* court sought compliance with the spirit and intent of the Rule. In this case, however, the procedure employed by the trial court undermined the very assurance of the Rule that Defendant would have a minimum number of challenges which he could expect to exercise in a meaningful fashion. *Rucker, supra.*

> Although the right to peremptory challenges is not an aspect of the constitutional right to trial by by jury, it is one of the most important rights of the accused, and, normally, "(t)he denial or impairment of the right is reversible error without a showing of prejudice" *Swain* v. *Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). *United States* v. *Gonzalez Vargas,* 585 F2d 546 (1978).

While Defendant is not compelled to show prejudice where is right to exercise his peremptory challenges is impaired as here, prejudice still bore on Defendant due to the selection method imposed by the judge. As discussed, *infra,* Defendant sought the dismissal of the final juror drawn, a bank teller. When he failed to secure the juror's dismissal for cause, he learned that the procedure for exercising peremptory challenges prohibited him from peremptorily challenging this juror because he had previously forfeited a challenge during one of the preceding rounds. The system was inherently unfair to Defendant and, therefore, his conviction should be reversed.

B. The Trial Court's refusal to grant Defendant's challenge for cause to a prospective juror who was a bank teller, where Defendant is charged with a banking crime, is reversible error.

Defendant contends that he was denied his constitutional right to a trial before a panel of impartial jurors. Defendant contends that the very profession of the bank teller juror constitutes bias, and the juror should, therefore, have been excused for cause. The court's failure to grant the challenge is reversible error.

> The issue of jury bias in a criminal trial involves mixed questions of law and fact, *Reynolds* v. *United States*, 98 U.S. 145, 156, 25 L.Ed 244 (1878), for which there is no single determinative test. As stated in *United States* v. *Woods*, 299 U.S. 123, 146, 57 S.Ct. 177, 185, 81 L.Ed 78 (1936):
>
> > Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.
>
> *Phillips* v. *Smith*, (S.D.N.Y. 1980) 485 F. Supp. 1365, 1370.

Courts distinguish between those claims which show actual bias, which may be said to exist where there is sufficient evidence of a juror's prejudiced state of mind, and implied bias. In the latter case, where one seeks to establish implied bias, the foundation for the formulation of a test is set forth in *Tumey* v. *Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed 749 (1926) and cited in *Phillips* v. *Smith*, supra at 1370.

> (E)very procedure which would offer a possible temptation of the *average* man . . . to forget the burden of proof required to convict the defendant, or

> which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law. (Emphasis supplied)

It is the contention of Defendant, herein, that the bank teller fits into the latter category of implied bias. In *Phillips* v. *Smith*, supra, a juror who sat on the trial of Defendant's homicide case, sought employment with the Major Felony Unit in the District Attorney's Office. The court's rationale in finding implied bias in *Phillips*, was not predicated solely on the fact that the juror's application was with the District Attorney's Office. Rather, the court found the implied bias in the fact that the juror sought employment in a "clearly definable context which was closely related to the matter being tried".

While it is generally held in those cases considering the issue that a government employee is not disqualified from sitting on a jury solely because of his employment by the government (where the government is a party),

> Nonetheless, it has been implied that exceptional circumstances may exist which would warrant a finding of inherent prejudice based on the employment affiliation of a juror. *Phillips, supra* at 1371.

The conclusion is clear in *Phillips* that where a prospective juror's work is related in any significant way to the matter being tried, implied bias exists.

> The relationship may be remote; the person may never have seen the party, he may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice. *United States* v. *Burr*, 25 Fed.Cas.P. 49, 50 (14,692g) (C.C.Va.1807). Cited in *Phillips, supra* at 1372.

A juror who is a bank teller who must pass judgment on banking procedures, determine guilt or innocence, and then return to one's work place and the possibility that one's employer will know of the trial the teller has sat on, is so likely to be prejudiced whether it is admitted or not. The juror is bound to feel compelled to find the person charged guilty simply to preserve his position of integrity in his own work place, so as not to cast a shadow of doubt on his own performance. The refusal of the trial court to grant Defendant's challenge for cause in the instant case was, therefore, reversible error.

II. THE COURT OF APPEAL WAS CLEARLY IN ERROR IN HOLDING THAT THE PETITIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION WAS NOT VIOLATED WHEN THE CO-DEFENDANT TESTIFIED THAT AT AN EARLIER DATE PETITIONER WAS GOING TO ENTER A PLEA OF GUILTY.

During the cross examination of the co-defendant, the co-defendant suggested through his testimony, in an unresponsive manner, that both he and the Defendant-Appellant were on their way to court at an earlier date to both enter guilty pleas. Defense counsel objected that the testimony was unresponsive. The objection was sustained and the court gave the jury a cautionary instruction that the evidence was not to be considered in their deliberations. Defendant-Appellant moved for a mistrial as the result of this testimony. On appeal he claims that it was error for the court to fail to declare a mistrial.

The fact that the testimony was offered during cross examination is, of course, not relevant to the issue. This fact was acknowledged by the trial judge when he sustained defense counsel's objection to the co-defendant's unresponsive answer. However, a cautionary instruction simply is inadequate to cure the prejudice to Defendant's

case by the comment. The suggestion that Defendant-Appellant was prepared at one point to acknowledge his participation in and liability for the offense charged is fundamental to the presumption of innocence. *United States* v. *Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977). The risk of prejudice to Defendant-Appellant's basic rights requires reversal.

The stricken testimony came during the prosecution's case-in-chief. Defendant-Appellant still had available to him the choice as to whether he would testify or not. But the introduction of this incurable defect compelled Defendant-Appellant to take the stand in order to protest his innocence and attempt to counteract the suggestion that the trial was merely a sham, a pretense since he had once apparently been willing to plead guilty.

In *United States* v. *Dohn*, 618 F.2d 1169, 1176-1177 (5th Cir. 1980), Tate, J. concurring in part and dissenting in part, stated the issue most cogently. In that case the court had permitted testimony to stand regarding statements made by the accused during a bail hearing. The court stated:

> (A)dmitting such a withdrawn plea forces a defendant, in substance, if not in form, to testify against himself. *People* v. *Spitaleri*, 9 N.Y.2d 168; 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961). Similarly, when we allow statements made by a defendant at a bail hearing to be used against him at his merit-trial, in effect we permit the defendant to lose his right not to take the stand and his right to require the government to prove his guilt beyond a reasonable doubt independently of his own testimony.

Rule 410 of the Federal Rules of Criminal Procedure prohibits the admission into evidence of a plea later withdrawn. The instant case is, of course, one step further away from the issue and, therefore, even more certain to be inadmissible. The Advisory Committee notes are instructive, however, in clarifying the rationale for

prohibiting testimony regarding pleas and offers of pleas. The effect of admitting testimony on the plea or offer would be to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. Clearly defendant cannot be compelled to take the stand. A situation which creates such a compulsion is fundamentally unfair.

In the instant case, the stricken testimony was not simply contradictory with other testimony. It contradicted the trial itself. A jury could not help but conclude that their responsibility was anything more than perfunctory, that the defendant simply wanted his "day in court", and that if he was at one point willing to attest to his guilt, the trial was only a formality not a substantive determination of guilt or innocence. The presumption of innocence that cloaked defendant was outweighed, but not by the independent proof offered by the prosecution's case. The evidence outweighing the presumption arrived through the unresponsive testimony of the co-defendant.

Even though stricken, the testimony was bound to weigh heavily with the jury. A cautionary instruction could not redeem the damage. And defendant was left with no alternative but to testify and thereby attempt to overcome the prejudice. The cautionary instructions were inescapably insufficient so that the only proper remedy was for the trial court to grant defendant's motion for mistrial. Defendant-Appellant properly preserved the issue for appeal by not only objecting to the unresponsive nature of the testimony, but by making a motion for mistrial. The trial court erred in denying his motion.

III. THE COURT OF APPEALS WAS CLEARLY IN ERROR IN IGNORING THE UNITED STATES ATTORNEY'S QUESTIONING OF THE WITNESS, SIMS, AS TO WHETHER OR NOT SHE HAD HAD AN AFFAIR WITH THE DEFENDANT.

In *United States* v. *Dean*, 435 F2d 1 (6th Cir. 1970), the government introduced evidence that the defendant lived illicitly in an apartment with a single woman, although he was married and the father of three children. The court held that the evidence had no relevance to the offense of possession and passing of counterfeit notes with which Dean was charged. The court stated at 4:

> (E)vidence of Dean's departure from conventional moral standards was likely prejudical to his case. It was improper for the Government to attack defendant's character as part of its case in chief, and the defendant should not have been required to undertake to attempt to explain the compromising circumstance. We cannot be certain that his effort succeded in curing the error.

What the court seeks to avoid in *Dean* is the injection of collateral issues which have no bearing on the central issue of Defendant's guilt or innocence but which may reflect on him adversely, and if not adequately countered by Defendant, may cause the jury to find against him.

RELIEF SOUGHT

This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
JAMES D. O'CONNELL
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Highland Park, Michigan
September 1, 1981

APPENDIX

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Order of Judgment

No. 80-5013
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

GEORGE VICHOS
Defendant-Appellant

ORDER
(Filed: June 11, 1981)

Before WEICK, ENGEL and JONES, CIRCUIT JUDGES.

Appellant Vichos has appealed to this court from a judgment of conviction and sentence entered upon a jury verdict of guilty on an indictment charging him with conspiracy to cause the issuance of a large amount of bank obligations without authority and two counts of aiding and abetting in the issuance of such obligations in violation of 18 U.S.C. §§371 and 1005.

On appeal, he complains first of the requirement by the district court that the attorneys be required to exercise their peremptory challenges by round. Under this method, which was not objected to at the time, counsel for Vichos exercised all ten of the peremptory challenges. The next prospective juror was a bank teller with 20 years experience. The defense attempted to challenge her for cause but the district court denied the challenge. While perhaps the court might have granted the challenge solely for the sake of appearances, we do not find that the judge abused his discretion in denying the challenge.

We find no prejudicial error in the questioning of the witness for the prosecution Van Wyck about the amount of his restitution or in the denial of a motion for a mistrial due to an unresponsive answer given by Van Wyck to a ques-

tion propounded by defense counsel concerning which the court gave a cautionary instruction to the jury.

The court did not err or abuse its discretion in denying the motion to suppress evidence of the defendant's prior conviction which was admissible under Fed. R. Evid. 609. Nor was defendant denied his right to a speedy trial, *Barker* v. *Wingo*, 407 U. S. 514, 523 (1972) which he did not substantiate.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
(s) John D. Hehman
Clerk

Order Denying Petition for Rehearing

No. 80-5013
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

GEORGE VICHOS
Defendant-Appellant

ORDER
(Filed: July 22, 1981)

Before WEICK, ENGEL and JONES, *Circuit Judges.*

Upon consideration of the petition for rehearing, we are of the opinion that the record is not clear that appellant's counsel objected to requirement of the district judge that peremptory challenge in the selection of jurors be exercised by round, and that even if objection had been made, the court would not have abused his discretion in overruling it.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, *Clerk*
(s) Leonard Green
Chief Deputy Clerk

Follow-Up Indictment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* -vs- GEORGE VICHOS, *Defendant.*	CRIMINAL NO. 9-§419 VIO: 18 U.S.C. §371 and §1005, 2 Conspiracy to cause the issuance of bank obligations without authority by bank employee, and aiding and abetting in issuance of bank obligations by bank employee without authority.

FOLLOW-UP INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

On or about March 2, 1978 and continuing until on or about April 4, 1978, in the Eastern District of Michigan, Southern Division, GEORGE VICHOS, defendant herein, did knowingly, wilfully, and unlawfully combine, conspire, and agree, with Harold Van Wyck and Donna Sullivan and others not named herein, to commit an offense against the United States; to wit: to cause the making, drawing, issuance, and putting forth of obligations of a bank, whose deposits are insured by the Federal Deposit Insurance Corporation, by an employee thereof without the authority of the directors of said bank; in violation of Sections 1005 and 371, of Title 18, United States Code.

OVERT ACTS

In furtherance and to effect the object of the above-described conspiracy, the following overt acts were committed.

1. On or about March 15, 1978, Donna Sullivan, a bank employee, made, drew, issued, and put forth two Community National Bank Cashier's Checks payable to GEORGE VICHOS without the authority of the directors of such

bank; to wit: Cashier's Check No. 276603, dated March 15, 1978, in the amount of $12,335.68 and Cashier's Check No. 276874, dated March 15, 1978, in the amount of $8,741.24.

2. On or about March 15, 1978, Donna Sullivan gave the above-described cashier's checks to Harold Van Wyck who gave them to GEORGE VICHOS, defendant herein.

3. On or about March 16, 1978, GEORGE VICHOS, defendant herein, did cash cashier's checks numbers 276603 and 276874 at a bank.

4. On or about March 16, 1978, Donna Sullivan, a bank employee, made, drew, issued, and put forth three Community National Bank Cashier's Checks all payable to GEORGE VICHOS, without the authority of the directors of said bank; to wit: Cashier's Check No. 276604, in the amount of $8,536.92; Cashier's Check No. 276898, in the amount of $9,867.45; and Cashier's Check No. 276910, in the amount of $11,225.36.

COUNT II

On or about March 15, 1978, in the Eastern District of Michigan, Southern Division, GEORGE VICHOS, defendant herein, did knowingly and wilfully aid, abet, counsel, and procure an employee of the Community National Bank of Pontiac, a bank whose deposits are insured by the Federal Deposit Insurance Corporation, to make, draw, issue, and put forth, without authority from the directors of such bank, obligations of said bank; to wit: Cashier's Check No. 276603, dated March 15, 1978, in the amount of $12,335.68, payable to GEORGE VICHOS, and Cashier's Check No. 276874 dated March 15, 1978, in the amount of $8,741.23, payable to GEORGE VICHOS, all in violation of Sections 2 and 1005 of Title 18, United States Code.

COUNT III

On or about March 16, 1978, in the Eastern District of Michigan, Southern Division, GEORGE VICHOS, defen-

dant herein, did knowingly and wilfully, aid, abet, counsel, and procure an employee of the Community National Bank of Pontiac, a bank whose deposits are insured by the Federal Deposit Insurance Corporation, to make, draw, issue, and put forth, without authority from the directors of said bank obligations of said bank to wit: 1) Cashier's Check No. 276604, dated March 16, 1978, payable to GEORGE VICHOS, in the amount of $8,536.92; 2) Cashier's Check No. 276898, dated March 16, 1978, in the amount of $9,867.45, payable to GEORGE VICHOS; and 3) Cashier's Check No. 276910, dated March 16, 1978, payable to GEORGE VICHOS, in the amount of $11,225.36; all in violation of Sections 2 and 1005 of Title 18, United States Code.

THIS IS A TRUE BILL.
Foreman

JAMES K. ROBINSON
United States Attorney

ELLEN G. RITTEMAN (P25692)
Assistant United States Attorney

DATED:

Opposition

Office - Supreme Court, U.S.
FILED
NOV 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-518

In the Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE VICHOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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D. LOWELL JENSEN
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QUESTIONS PRESENTED

1. Whether the court of appeals properly found that the trial judge had not abused his discretion by allowing peremptory challenges of prospective jurors to be exercised by rounds and by denying petitioner's challenge for cause of one juror.

2. Whether the court of appeals properly found that the trial judge had not abused his discretion in ruling on evidentiary matters during cross-examination.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

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GEORGE VICHOS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1981. A petition for rehearing was denied on July 22, 1981. The petition for a writ of certiorari was filed on September 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in United States District Court for the Eastern District of Michigan, petitioner was convicted on two counts of aiding and abetting the issuance of obligations of a federally insured bank without proper authority, in violation of 18 U.S.C. 2, 1005, and on one count of conspiring to cause the issuance of such obligations, in

violation of 18 U.S.C. 371. He was sentenced to concurrent terms of three years' imprisonment on each count and fined $7,500. The court of appeals affirmed by per curiam order (Pet. App. 1a-2a).

The evidence showed that petitioner, co-defendant Harold VanWyck, an employee of petitioner's, and co-defendant Donna Sullivan, a bank secretary, were involved in a scheme whereby Sullivan prepared five bank cashier's checks totalling approximately $50,000 and transmitted the checks to petitioner through VanWyck. Petitioner cashed the checks at various local banks by first exchanging them for other cashier's checks or money orders and then cashing the money orders (I Tr. 150-163, 200-202).[1] After the improper issuance of the checks was discovered, petitioner voluntarily disclosed his involvement in the scheme to an official of the defrauded bank (III Tr. 106-112) and admitted to an FBI agent that he had cashed the checks (III Tr. 139).

ARGUMENT

All of the issues raised by this petition concern matters properly entrusted to the broad discretion of the district court. Petitioner has failed to demonstrate that this discretion was abused in any respect, or that the issues entail any important question of law warranting review by this Court.

1. The voir dire of the jury was conducted by the trial court using a system of peremptory challenges by rounds. That is, after 12 veniremen were seated and challenges for cause disposed of, the government would make one peremptory challenge and petitioner two. After the challenged veniremen were replaced, the government would make two challenges and petitioner three. This process was to be repeated until the government had made six challenges and

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[1] "Tr." refers to the trial transcript. "App." refers to the appendix in the court of appeals.

petitioner ten. Any challenges unused during a round were deemed waived.[2] Petitioner did not waive any challenges, but rather used all ten allotted to him (see I Tr. 76; App. 34, 38, 39, 42). After the last round of challenges, the first person seated as a replacement juror was a woman who had been a bank teller for 20 years. Petitioner's challenge for cause, on the ground that her occupation rendered her unqualified to sit as a juror, was denied.

a. The trial court properly denied petitioner's challenge for cause. Petitioner's argument in the trial court was that the juror was "not qualified" to sit on the jury (Tr. 98-99). In this Court, petitioner contends that the juror was impliedly biased solely because of her profession (Pet. 12). Petitioner notes (Pet. 12-13) that the test for implied bias of a sort which may incapacitate a person from serving as a juror is whether "in general persons in a similar situation would feel prejudice" (*United States* v. *Burr*, 25 Fed. Cas. 49, 50 (C.C. D. Va. 1807) (No. 14,692g)) or, put another way, whether "the average man" would be under "a possible temptation * * * to forget the burden of proof required to convict" or otherwise be led "not to hold the balance nice, clear and true" between the prosecution and the accused. *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). Petitioner argues that the juror fell within that test because, as a bank teller serving as a juror in a case in which there would be testimony about banking procedures, she was under some unidentified compulsion to return a guilty verdict in order not to appear to

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[2]The court of appeals originally noted that petitioner did not object to this procedure at the time (Pet. App. 1a). In denying a petition for rehearing, the court observed that "the record is not clear that [petitioner's] counsel objected * * *" and that, even if he had, the trial court would not have abused its discretion in overruling such an objection (Pet. App. 3a). All the trial record reflects is that *after* the jury was in place, petitioner's counsel objected and referred at that late stage to a prior objection apparently made off the record (I Tr. 97).

her employer to be sympathetic to dishonest banking practices (see Pet. 14). But any juror, regardless of occupation and regardless of the specific offense being tried, can similarly be said to be under compulsion to return a guilty verdict so as not to appear to his employer to be sympathetic to dishonest practices in general.

Implied bias does not arise from the undifferentiated compulsion petitioner alleges, but rather only where the possibility exists that the fact finder may have a personal interest in the outcome of the case. For example, in *Tumey* the village mayor who tried the case was by law paid only in the event of a conviction, and any fines assessed were shared between his village and the state. And in *Phillips* v. *Smith*, 485 F. Supp. 1365 (S.D.N.Y.), aff'd, 632 F. 2d 1019 (2d Cir. 1980), cert. granted, No. 80-1082 (Feb. 23, 1981), a juror, during the course of the trial, applied to the prosecutor's office for employment. Whatever the merit of the grant of habeas corpus relief in that case, the trigger for arguable juror disqualification involved a specific act by the juror during the course of the trial.[3]

It should be noted that the juror in the instant case was not employed by the bank that was victimized by the alleged fraud. Moreover, the trial judge conducted a thorough voir dire (1 Tr. 43-47) and concluded that "[i]n listening to this juror, I'm satisfied that there is nothing on this record which would justify the exclusion of this juror from participation in this particular case."

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[3]Petitioner relies on the district court opinion in *Phillips*. On appeal, however, the Second Circuit made clear that the basis for its affirmance was not any conclusion that the juror in that case was presumptively biased; rather, the basis was the prosecutor's misconduct in failing to inform the court and defense counsel of the juror's employment application. 632 F. 2d at 1022, 1024. It was precisely because of the prosecutor's silence in *Phillips* that the trial court was unable to conduct an examination of the sort conducted here. *Id.* at 1023.

b. Alternatively, petitioner contends that the system for exercising peremptory challenges improperly deprived him of an opportunity to make such a challenge to the bank teller. The contention is without merit. A trial court has wide discretion in adopting a system for the exercise of peremptory challenges, provided only that the full and unrestricted exercise of the right to challenge peremptorily is not prevented or embarrassed. *St. Clair* v. *United States*, 154 U.S. 134, 147-148 (1894); *United States* v. *Haldeman*, 559 F. 2d 31, 80 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *Anderson*, 562 F. 2d 394, 396-397 (6th Cir. 1977); *United States* v. *Morris*, 623 F. 2d 145, 151 (10th Cir. 1980). There was no prevention or embarrassment of the right to challenge peremptorily in this case. In contrast to *United States* v. *Sams*, 470 F. 2d 751 (5th Cir. 1972), petitioner does not contend that any challenges were unwittingly deemed waived. Here, the system to be used was announced by the court prior to the selection of the jury, so that petitioner knew what to expect. Moreover, again in contrast to *Sams*—where defendant was permitted to use only two of his ten challenges—petitioner here exercised all ten of his challenges. A defendant always runs the risk that, after he has used up his peremptory challenges, a juror will be seated who is more unsatisfactory to him than those he has challenged.

2. Laura Sims, an employee of petitioner's who had introduced petitioner and VanWyck to Sullivan (I Tr. 150), testified as a defense witness. It was developed on cross-examination, without objection from petitioner, that she and petitioner had had an affair (IV Tr. 58). There is no merit to petitioner's claim that reversible error was thereby committed. The trial court has broad discretion over cross-examination. *Michelson* v. *United States*, 335 U.S. 469, 480 (1948). In any event, the cross-examination question was relevant to establish the witness's motive and possible bias in testifying.

Since no objection was made, reversal is mandated only if plain error is shown (Fed. R. Crim. P. 52(b)), and petitioner makes no such showing. Here, there was a single question asked for a proper purpose on cross-examination of a defense witness. This case is, accordingly, wholly unlike *United States* v. *Dean*, 435 F. 2d 1, 2 (6th Cir. 1970)—upon which petitioner relies (Pet. 17)—in which the government repeatedly elicited irrelevant testimony during direct examination of its witnesses concerning meretricious conduct by the defendant.[4] There was here, in addition, no prejudice to petitioner. His marital status was not brought to the jury's attention by the government, and he himself did not testify.

3. As part of a rigorous cross-examination by defense counsel, government witness VanWyck was questioned concerning the termination of his employment with petitioner. In response he stated (App. 121):

> Toward the last, Mr. Vichos and I weren't getting along and, to be honest with you, it was on account of this here case, because I was thinking of pleading guilty, and I asked Mr. Vichos if he would and he even went so far as to coming to court, acting as his own attorney so he could go and talk to the prosecutor.

The court promptly instructed:

> I will strike that portion of Mr. VanWyck's testimony that went beyond the conclusion of his employment with Homedic * * * because he and Mr. Vichos did not get along because of the case. Anything beyond the talk about what Mr. Vichos may have said or done should be and must be disregarded by you in your evaluation of this case.

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[4]Moreover, unlike in *Dean*, the evidence of petitioner's guilt was overwhelming.

Not until the next day did petitioner move for a mistrial. The court—noting its curative admonition to the jury, its observation of the jury which led it to believe that the instruction would be followed, and the minimal prejudicial nature of VanWyck's nonresponsive remarks—properly denied the motion (II Tr. 70-72). Contrary to petitioner's assertion (Pet. 14), VanWyck did not expressly state—and it is far from clear that VanWyck's remarks would necessarily be interpreted by the jury as a statement—that petitioner had intended to enter a guilty plea. In a case where a police officer, testifying as a government witness, made an improper response on cross-examination that was more clearly prejudicial to the defendant than the remarks made by VanWyck in this case, an admonition by the court considerably more terse than the court's admonition here was held to be sufficiently curative. *United States* v. *Rojas*, 537 F. 2d 216, 221-222 (5th Cir. 1976), cert. denied, 429 U.S. 1061 (1977); see also *United States* v. *Garcia*, 625 F. 2d 162, 168-169 (7th Cir 1980). In *United States* v. *Candelaria-Gonzalez*, 547 F. 2d 291 (5th Cir. 1977) (repeated use of improper hypothetical questions to challenge defendant's character), and *United States* v. *Dohm*, 618 F. 2d 1169 (5th Cir. 1980) (use of defendant's statements made at bail hearing without knowing waiver of privilege against self-incrimination), upon which petitioner relies (Pet. 15), no curative instructions were given; to the contrary, the error found in both cases was the admission of the improper testimony into evidence. As for petitioner's claim that VanWyck's remarks violated his Fifth Amendment privilege against self-incrimination by compelling him to testify in order to counteract them (Pet. 14-15), the simple answer is that petitioner did not in fact testify.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

D. LOWELL JENSEN
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MARSHALL TAMOR GOLDING
Attorney

NOVEMBER 1981

DOJ-1981-11